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No. 01-1491

In the Supreme Court of the United States

CHARLES DEMORE, DISTRICT DIRECTOR, ET AL.,
PETITIONERS

v.

HYUNG JOON KIM

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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In this case, the Ninth Circuit has held unconstitutional an Act of Congress. The court of appeals' decision has great practical importance for thousands of permanent resident aliens who are subject to mandatory detention under 8 U.S.C. 1226(c), and for the effective implementation of the immigration laws. The Ninth Circuit, moreover, has disagreed expressly with the Seventh Circuit's constitutional holding in *Parra* v. *Perryman*, 172 F.3d 954, 958 (1999). See Pet. App. 26a-27a. As the petition explains (Pet. 10-19), certiorari is warranted for those reasons.

1. Respondent asserts that the circuit split identified in the petition (Pet. 11-12) is insignificant because the situation of the alien in *Parra*—a permanent resident

who did not dispute his removability from the United States—was "unique." Br. in Opp. 13. Since 1996, however, the INS has detained more than 75,000 lawful permanent residents and other criminal aliens pursuant to the requirements of Section 1226(c).[1] Many of those aliens do not challenge their removal, because pursuing a non-meritorious claim only prolongs their proceeding and associated detention. See *Parra*, 172 F.3d at 958 ("An alien in Parra's position can withdraw his defense of the removal proceeding and return to his native land, thus ending his detention immediately."). The Ninth Circuit, moreover, did not purport to distinguish *Parra* on the factual grounds respondent suggests. Rather, the court of appeals concluded that *Parra* "was incorrectly decided." Pet. App. 26a.

Respondent attempts to minimize the breadth of the circuit conflict (which involves the Third and Tenth Circuits, as well as the Seventh and Ninth, see Pet. 11-12) by distinguishing *Radoncic* v. *Zemski*, 28 Fed. Appx. 113 (3d Cir. 2002) (No. 01-1074), petition for cert. pending, No. 01-1459 (filed Apr. 9, 2002), as a case involving an alien who entered the United States without inspection. See Br. in Opp. 14-15. As the pending petition in *Radoncic* explains (at 19-22), the factual differences between this case and *Radoncic* provide reason to grant *both* the petition in *Radoncic and* the petition in this case. For purposes of this petition, however, the important point is that *Patel* v. *Zemski*, 275 F.3d 299 (3d Cir. 2001), which involved a permanent

[1] From Fiscal Year 1991 though Fiscal Year 2000, more than nine million aliens were granted permanent resident status in the United States. See Immigration and Naturalization Service (INS), *Immigrants, Fiscal Year 2000*, at 9, Table 2 <http://www.ins.usdoj.gov/graphics/aboutins/statistics/IMM00yrbk/IMM2000.pdf>.

resident alien, aligns the Third Circuit with the Ninth and Tenth Circuits, in direct and express conflict with *Parra*. See *id.* at 313 ("We disagree with the holding in *Parra*."); see also *Hoang* v. *Comfort*, 282 F.3d 1247, 1255-1256 (10th Cir. 2002) (rejecting government's reliance on *Parra*), petition for cert. pending, No. 01-1616 (filed May 3, 2002).

2. Respondent erroneously contends that *Zadvydas* v. *Davis*, 533 U.S. 678 (2001), establishes that *Parra* was wrongly decided. Br. in Opp. 12-13, 15-18. In *Zadvydas*, the Court interpreted 8 U.S.C. 1231(a) to limit the duration of detention of a permanent resident alien *following* his final removal order, thereby avoiding constitutional concerns. See 533 U.S. at 688-701. The critical fact in *Zadvydas* was that the detention provision there at issue otherwise would have authorized "indefinite, perhaps permanent, detention." *Id.* at 699; see also *id.* at 690 ("A statute permitting indefinite detention of an alien would raise a serious constitutional problem."). The Court removed this constitutional doubt by construing 8 U.S.C. 1231(a) to authorize detention of such aliens only as long as removal is reasonably foreseeable. *Id.* at 699.

No similar judicial limitation on Section 1226(c) is required. Section 1226(c) itself specifies an "obvious termination point" (533 U.S. at 697) for detention, because the provision applies only during the alien's removal proceedings. Detention of an alien who is under a final order of removal is governed by 8 U.S.C. 1231(a), the provision this Court interpreted in *Zadvydas*.

Respondent says that "under *Zadvydas*, it is the deprivation of liberty that triggers a due process claim" and, therefore, the duration of detention is not significant. Br. in Opp. 17. But the *existence* of a due pro-

cess claim does not settle the issue. It is the *strength* of the alien's due process claim in its full context that matters. The duration of detention can be dispositive of the due process analysis, as *Zadvydas* shows.

When he addresses the duration of detention under Section 1226(c), respondent asserts that it "routinely last[s] months and even years." Br. in Opp. 17. That is highly misleading. As a matter of policy, the Executive Office for Immigration Review expedites removal proceedings for aliens who are detained under Section 1226(c). That Office has calculated that its immigration judges (IJs) complete removal proceedings for aliens who are subject to detention under Section 1226(c) in an average time of 47 days.[2] About 85% of the time, the IJ's decision is not appealed to the Board of Immigration Appeals (Board) and becomes final, and the alien thereafter would be detained (if ordered removed) under 8 U.S.C. 1231(a) rather than Section 1226(c). In the relatively small percentage of cases that are appealed to the Board, the average time required for disposition of the appeal—from the filing of the appeal through the Board's issuance of its decision—is approximately four months. Accordingly, detention during the pendency of removal proceedings cannot fairly be compared to the "indefinite, perhaps permanent, detention" of aliens that concerned the Court in *Zadvydas*.

[2] This average processing time is based upon the amount of time between the docketing of the INS's charging document and the issuance of an appealable decision by an IJ, for cases completed in the 2001 fiscal year. The average time does not apply to cases handled by an IJ while the alien is in criminal custody; in that situation, the alien is not detained by the INS pursuant to Section 1226(c). See 8 U.S.C. 1228(a).

3. Respondent focuses his constitutional argument largely upon the fact that detention under Section 1226(c) reflects congressional determinations about the implications of certain criminal convictions, rather than individualized judgments about flight risk and dangerousness. Respondent asserts (Br. in Opp. 15-21) that basing detention upon Congress's judgments violates due process despite Congress's broad powers to classify aliens and to regulate their admission and removal, see *Plyler* v. *Doe*, 457 U.S. 202, 225 (1982), and despite the INS's documented inability to deport many non-detained criminal aliens, see Pet. 14-17.

a. Respondent cites *Zadvydas* for the proposition that this Court should not afford any particular deference to Congress's judgments about the importance of detaining criminal aliens to ensure their removal from the United States. See Br. in Opp. 13 n.11, 18. *Zadvydas*, however, did not overrule the longstanding principle that such judgments deserve particular judicial respect. See, *e.g.*, *Shaughnessy* v. *Mezei*, 345 U.S. 206, 210 (1953) ("Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control."); *Plyler* v. *Doe*, 457 U.S. 202, 225 (1982) ("Congress has developed a complex scheme governing admission to our Nation and status within our borders. The obvious need for delicate policy judgments has counseled the Judicial Branch to avoid intrusion into this field.") (citations omitted).

Zadvydas held in relevant part that (1) Congress's exercise of its plenary power over immigration "is subject to important constitutional limitations," and (2) the Constitution may prohibit indefinite detention of deportable aliens whom the Government is unable to

remove. 533 U.S. at 695. The first of those holdings is of course relevant here, but it does not suggest that Section 1226(c) violates due process. The second holding is inapposite. In *Zadvydas*, the INS was unable to implement the aliens' final orders of removal, which itself frustrated Congress's immigration policy. See *id.* at 685-686. In that situation—where the detention of an alien lawfully admitted for permanent residence was not related to the ultimate purposes of detention (to facilitate the foreseeable removal of the alien from the United States)—the Court construed 8 U.S.C. 1231(a)(6) as not reflecting an exercise of Congress's powers over immigration. *Id.* at 695-696, 699. But where removal of an alien is reasonably foreseeable, Congress's immigration-related rationale for detention applies, and the *Zadvydas* Court did not question the constitutionality of extended detention. See *id.* at 699-701.

The detention of aliens covered by Section 1226(c) lasts only as long as an INS charge of removability is pending before an IJ or the Board. It therefore is analogous—not to detention under Section 1231(a) when removal is not foreseeable—but to the detention in aid of foreseeable removal that the *Zadvydas* Court upheld. *Zadvydas* therefore does not dictate the overturning of the congressional judgments that underlie Section 1226(c). See *Wong Wing* v. *United States*, 163 U.S. 228, 235 (1896) ("Proceedings to exclude or expel would be vain if those accused could not be held in custody pending the inquiry into their true character and while arrangements were being made for their deportation.").

b. Respondent suggests that bond hearings would serve Congress's purposes just as well as mandatory detention. See Br. in Opp. 7 n.8, 20-21, 23-25. That

argument is untenable in light of the history of Section 1226(c). As the petition explains (at 14-15), Congress enacted Section 1226(c) because it was dissatisfied with the high rate of flight by criminal aliens under immigration laws that authorized individualized bond hearings. The fact that Congress enacted Section 1226(c) to replace those earlier provisions definitively shows Congress's determination that the case-by-case predictions made by IJs at bond hearings cannot be relied upon to provide adequate protection against criminal aliens' risk of flight and danger to the community.

Congress's contemporaneous awareness of opposition to the mandatory detention provisions of Section 1226(c) (see Br. in Opp. 2-3) undercuts, rather than strengthens, respondent's argument. Although Congress had been made aware that mandatory detention of criminal aliens would tax INS resources and perhaps require a reduction in other INS enforcement efforts, it nevertheless required detention after the expiration of a transitional period of up to two years. See 8 U.S.C. 1226 note (reprinting transition provisions of Section 303(b)(2) of Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-586). It thus cannot be said that Congress adopted mandatory detention without full consideration of its consequences, and it is clear that Congress attached a high priority to mandatory detention when it reformed the immigration laws in 1996. See Pet. 3-4, 14-17 (discussing legislative history).

4. In urging this Court to deny review, respondent invokes a currently pending House bill (H.R. 1452, 107th Cong. (2001)) that, if enacted into law, would affect the scope of Section 1226(c). See Br. in Opp. 3-4. That proposed legislation was introduced by the same sponsor in similar form in earlier Congresses, but was

not reported out of committee. See H.R. 1485, 106th Cong. (1999); H.R. 2052, 105th Cong. (1997). Other bills introduced in past Congresses have proposed changes to Section 1226(c), and they likewise were not enacted. *E.g.*, S. 3120, 106th Cong. (2000); H.R. 4966, 106th Cong. (2000). Presently, there is no foreseeable likelihood that legislation will moot this case. Indeed, the Chairman of the House Immigration and Claims Subcommittee, Representative George Gekas, has joined in the filing of an amicus brief in support of the government's petition in this case.

5. Respondent attaches great significance to his release on bond by the INS's district director. Br. in Opp. 5, 11, 22, 26. The district court, however, had ordered the district director and the Attorney General, as defendants in the habeas corpus case, to provide respondent with an individualized bond hearing. See Pet. App. 50a. Contrary to respondent's suggestion (Br. in Opp. 11), the manner in which the district director complied with the court's order indicates no lack of "interest" by the government in enforcing the requirements of Section 1226(c) against respondent and other criminal aliens whom Congress has ordered detained.

6. Finally, respondent argues that Section 1226(c) can be construed "as not applying to a lawful permanent resident such as the respondent who has not yet been ordered deported by an immigration judge." Br. in Opp. 26 n.22. As the court of appeals held, "such a construction is not available" because it is contrary to the plain language of the statute. Pet. App. 28a; accord *Hoang*, 282 F.3d at 1260-1261. Section 1226(c) contains no exception for permanent residents and no requirement that there be an adjudication of removability before detention. Under respondent's reading, more-

over, Section 1226(c) would be both redundant of, and inconsistent with, Section 1231(a), which specifically addresses detention after a final order of removal. The court of appeals gave Section 1226(c) its only plausible meaning. The court's decision that Section 1226(c), as so construed, is unconstitutional when applied to respondent warrants review by this Court.

* * * * *

The petition for a writ of certiorari should be granted and the case should be set for oral argument in tandem with, or be consolidated for oral argument with, *Elwood* v. *Radoncic*, petition for cert. pending, No. 01-1459 (filed Apr. 4, 2002).

Respectfully submitted.

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